

CONSTITUTIONAL COURT  
G 258-259/2017-9  
December 4, 2017

## IN THE NAME OF THE REPUBLIC

The Constitutional Court, chaired by President  
Gerhart HOLZINGER,

in the presence of Vice-President Brigitte BIERLEIN

and the members

Markus ACHATZ,  
Eleonore BERCHTOLD-OSTERMANN,  
Sieglinde GAHLEITNER,  
Christoph GRABENWARTER,  
Christoph HERBST,  
Michael HOLOUBEK,  
Helmut HÖRTENHUBER,  
Claudia KAHR,  
Georg LIENBACHER,  
Rudolf MÜLLER,  
Johannes SCHNIZER and  
Ingrid SIESS-SCHERZ

as voting members, in the presence of Claudia REITHMAYER-EBNER, member of the scientific staff,  
as the recording clerk

has decided today after private deliberations in the proceedings initiated ex officio to review the constitutionality of the phrase "of different sex" in section 44 of the General Civil Code (*ABGB, Allgemeines Bürgerliches Gesetzbuch*), Collection of Laws (*JGS, Justizgesetzsammlung*) 946/1811, and of the Federal Act on Registered Partnership (*EPG, Eingetragene Partnerschaft-Gesetz*), Federal Law Gazette I 135/2009 as amended by Federal Law Gazette I 25/2015, pursuant to Art. 140 of the Federal Constitutional Law (*B-VG, Bundesverfassungsgesetz*) as follows:

- I.
  1. The phrase "of different sex" in section 44 of the General Civil Code, Collection of Laws 946/1811, and the phrases "of same-sex couples" in section 1, "of the same sex" in section 2 and section 5 (1) item 1 of the Federal Act on Registered Partnership, Federal Law Gazette I 135/2009 as amended by Federal Law Gazette I 25/2015, are repealed as unconstitutional.
  2. The repeal shall take effect as per the close of December 31, 2018.
  3. Earlier legal provisions shall not re-enter into force.
  4. The Federal Chancellor shall immediately promulgate these findings in Federal Law Gazette I.
- II. In all other respects, the Federal Act on Registered Partnership, Federal Law Gazette I 135/2009 as amended by Federal Law Gazette I 25/2015, is not repealed as unconstitutional.

## **Reasoning**

### **I. Case that triggered the judicial review proceedings, judicial review resolution and preliminary proceedings**

1. The first and second complainants in the complaint proceedings submitted under E 230-231/2016 to the Constitutional Court and based on Art. 144 of the Federal Constitutional Law have been living in a registered partnership since 2012 and are the parents of the minor third complainant, who has been growing up in that relationship. Their applications, among other things for permission to enter into marriage, were rejected by the Vienna City Administration in an administrative decision of August 25, 2015; their complaints lodged against this decision, among other things, were not

upheld by the Vienna Administrative Court pursuant to section 44 of the General Civil Code, Collection of Laws 946/1811.

2. When dealing with the complaint lodged against this decision, concerns<sup>2</sup> arose in the Constitutional Court as to the constitutionality of the phrase "of different sex" in section 44 of the General Civil Code, Collection of Laws 946/1811, and of the Registered Partnership Act, Federal Law Gazette I 135/2009 as amended by Federal Law Gazette I 25/2015. Therefore, the Constitutional Court decided of its own volition on October 12, 2017 to review these legal provisions with regard to their constitutionality.

3. Regarding the admissibility and scope of the judicial review proceedings,<sup>3</sup> the Constitutional Court stated as follows:

"2. For the time being, the Constitutional Court is acting on the presumption that the complaint is admissible, that the Vienna Administrative Court applied the phrase of section 44 of the General Civil Code, which is under review, when issuing the contested decision (and that it is also not inconceivable that this provision must be applied in the decision of the Administrative Court, cf. Selected Judgements of the Constitutional Court 5373/1966, 8318/1978, 8999/1980, 12.677/1991, 16.073/2001, 16.241/2001), and that therefore the Constitutional Court would also have to apply this provision in its decision on the complaint (cf. Selected Judgements of the Constitutional Court 19.682/2012).

3. Furthermore, for the time being the Constitutional Court is acting on the presumption that the requirement of being of the opposite sex for access to marriage, which is expressed in the phrase under review in section 44 of the General Civil Code, is inseparably connected with the Registered Partnership Act, which stipulates the requirement of being of the same sex in sections 1, 2, and 5 (1) item 1 for access to a registered partnership. For if legislators only gave access to registered partnership to persons of the same sex, it could be concluded that marriage was reserved for persons of different sex. So if the Constitutional Court, should the concerns be justified, only repealed the restriction on access to marriage to opposite-sex couples in section 44 of the General Civil Code, such a restriction could still be derived from the analogous restriction on access to a registered partnership to same-sex couples in sections 1, 2 and 5 (1) item 1 of the Registered Partnership Act. If the concerns were justified, the repeal of the entire Registered Partnership Act would be advisable, because a repeal of only specific provisions providing for a restriction on access in the Registered Partnership Act (i.e. the phrases "of same-sex couples" in section 1 of the Registered Partnership Act, "of the same sex" in section 2 of the Registered Partnership Act, and § 5 (1) item 1 of the Registered Partnership Act) that mirror restriction on access in section 44 of the General Civil Code, which is under review, would have the effect that the remaining provisions of the act would obtain a completely different meaning (cf. Selected Judgements of the Constitutional Court 13.965/1994 with further references, 16.542/2002, 16.911/2003) insofar as opposite-sex and same-sex couples could enter into marriage or a registered partnership. A repeal of the entire Registered

Partnership Act therefore – in the view of the Constitutional Court for the time being – seems to represent a lesser change to the existing legal situation to eliminate any unconstitutionality than the repeal of only the phrases "of same-sex couples" in section 1 of the Registered Partnership Act, "of the same sex" in section 2 of the Registered Partnership Act and of section 5 (1) item 1 of the Registered Partnership Act. Insofar, the entire Registered Partnership Act seems to be inseparably connected with the phrase under review in section 44 of the General Civil Code. It will have to be clarified in the judicial review proceedings whether in the case of the repeal of the entire Registered Partnership Act as amended by Federal Law Gazette I 25/2015 (which means that section 8 (4) of the Registered Partnership Act, which was repealed by decision 19.942/2014 in the Selected Judgements of the Constitutional Court and ceased to have effect due to the promulgation in this Federal Law Gazette, will not be included in the review, as the Constitutional Court is not permitted to do this, cf. only Selected Judgements of the Constitutional Court 16.819/2003) the provisions stipulated in Federal Law Gazette I 59/2017 with regard to the Registered Partnership Act would remain in the legal system as a 'torso devoid of meaning' or whether these amending provisions would become obsolete due to the repeal of the entire Registered Partnership Act. "

4. The Constitutional Court explained its concerns that caused it to institute the judicial review proceedings in the judicial review resolution as follows: 4

"4.1. Pursuant to section 44 of the General Civil Code, marriage can be entered into only by two persons of different sex; same-sex couples can enter into a registered partnership pursuant to the Registered Partnership Act. The Civil Status Act (*PStG, Personenstandsgesetz*) requires this legal understanding to the extent that it relates to marriage or registered partnership (cf. Supreme Administrative Court September 19, 2013, 2011/01/0150; October 29, 2014, 2013/01/0022; July 6, 2016, Ro 2014/01/0018). Both marriage and registered partnership have been devised as an all-encompassing, permanent partnership of two humans with equal rights, according to the partnership principle, based on mutual support and consideration (cf. sections 44 and 89 ff. of the General Civil Code and sections 2 and 8 ff. of the Registered Partnership Act). This means that marriage and registered partnership have in common that they create a legal framework for couples to live together with equal rights by institutionalizing a permanent, stable relationship (cf. Selected Judgements of the Constitutional Court 19.942/2014).

4.2. Meanwhile, legislators – to some extent prompted by decisions by the European Court of Human Rights – have largely harmonized the legal status of spouses and registered partners in many legal fields (regarding tenancy law, see sections 12, 14 and 46 of the Tenancy Act [*MRG, Mietrechtsgesetz*], Federal Law Gazette 520/1981 as amended by Federal Law Gazette I 100/2014, in connection with section 43 (1) item 10 of the Registered Partnership Act; regarding labor and social insurance law, see *Mazal, Arbeits- und sozialrechtliche Aspekte der eingetragenen Partnerschaft* [Labor and social law aspects of registered partnerships], *iFamZ* [Interdisciplinary Journal for Family Law] 2010, 99 ff., and, for example, the 2nd Social Insurance Amendment Act 2013 [2. SVÄG 2013,

2. *Sozialversicherungs-Änderungsgesetz 2013*], Federal Law Gazette I 139/2013; regarding tax law, see Hilber, *Die eingetragene Partnerschaft im Steuerrecht* [Registered partnerships in tax law], *ecolex* [Journal for Business Law] 2010, 288 ff.; regarding trade law, see section 14 (3), section 41 (1) item 2, section 43 and section 65 of the Trade Act 1994 [*GewO, Gewerbeordnung 1994*], Federal Law Gazette 194/1994 as amended by Federal Law Gazette I 107/2017; regarding professional regulations, see section 5 (2) and section 14 (2) item 1 of the Chartered Engineering Consultants Act [*ZTG, Ziviltechnikergesetz*], Federal Law Gazette 156/1994 as amended by Federal Law Gazette I 50/2016; regarding inheritance law, see sections 730, 744 ff. and 757 ff. of the General Civil Code; regarding changes in marriage law and the law on registered partnerships in a narrower sense, see, in particular, the changes in the law on names and the law on civil status provided for in the Deregulation and Adjustment Act 2016 - Interior Affairs [*Deregulierungs- und Anpassungsgesetz 2016 – Inneres*], Federal Law Gazette I 120/2016.

4.3. Recent developments in law also allowed joint parenthood of same-sex couples: same-sex couples are allowed to (jointly) adopt (cf. in particular sections 191 and 197 of the General Civil Code) and give birth to children, within the limits of permitted forms of medically assisted procreation (cf. section 2 (1) in connection with (2) item 3 of the Reproductive Medicine Act [*Fortpflanzungsmedizinergesetz*], Federal Law Gazette 275/1992 as amended by Federal Law Gazette I 35/2015). In accordance with the possibility of joint parenthood, the provisions of the law on marriage and children regarding joint children, which regulate arrangements in a marital community and the requirements and consequences of the dissolution of a marriage or divorce, are now also applicable to registered partners and their children pursuant to section 43 (1) item 27 of the Registered Partnership Act (explanations regarding the government bill, annex 2403 of the National Council, 24<sup>th</sup> legislative period, p. 6).

4.4. There are still a few differences between the two legal institutions of marriage and registered partnership. Examples of differences are the different minimum age for entering into marriage and into a registered partnership (the possibility to be declared of marriageable age from the age of 16 pursuant to section 1 (2) of the Marriage Act [*EheG, Ehegesetz*]; in any event 18 years pursuant to section 4 (1) of the Registered Partnership Act). Furthermore, the circumstance that the Registered Partnership Act does not expressly provide for an engagement (unlike sections 45 f. of the General Civil Code), and the possibility of dissolving a registered partnership when the common household has been suspended for more than three years (section 15 (3) of the Registered Partnership Act, instead of six years in the case of marriage). Another difference appears to be the lower level of maintenance payments in the event of the dissolution of a registered partnership for the partner who was not at fault for, and did not want, the dissolution, because section 69 (2) of the Marriage Act (spousal maintenance in the case of a divorce pursuant to section 55 of the Marriage Act with a finding [as to who was at fault] pursuant to section 61 (3) of the Marriage Act) had not been taken over. Unlike section 90 of the General Civil Code, section 8 (2) of the Registered Partnership Act does not speak of an obligation to be faithful, but of a relationship that is based on trust (regarding the question of whether the meaning of the two concepts

actually differs, see *Beclin, Das Eingetragene Partnerschaft-Gesetz im Lichte des Eherechts* [The Registered Partnership Act in the light of marriage law], EF-Z [Journal for Family and Inheritance Law] 2010, 52 [53]).

5.1. The principle of equality is also binding on legislators (see, for example, Selected Judgements of the Constitutional Court 13.327/1993, 16.407/2001). This principle imposes limits on legislators insofar as it prohibits them from establishing provisions for which there are no objective reasons (cf. e.g. Selected Judgements of the Constitutional Court 14.039/1995, 16.407/2001). Only particularly serious reasons may justify unequal treatment in the law which is connected to potentially discriminating characteristics, such as those mentioned in Art. 7 (1) sentence 2 of the Federal Constitutional Law (or in Art. 14 of the ECHR) (cf. Selected Judgements of the Constitutional Court 19.942/2014, with further references to decisions of the Constitutional Court regarding statutory distinctions based on sex or sexual orientation).

5.2. When creating the Registered Partnership Act, legislators undoubtedly acted on the presumption that different legal institutions should exist for opposite-sex and same-sex couples (with different legal consequences for marriage and registered partnership) because marriage, following a certain traditional understanding (and because this concept has 'deep-rooted social and cultural connotations', cf. ECtHR, June 24, 2010, case *Schalk und Kopf*, appl. 30.141/04, no [62]; Selected Judgements of the Constitutional Court 19.492/2011) was aimed at parenthood (at least the possibility of it) and, for a long time, joint parenthood was not possible for same-sex couples (cf. Selected Judgements of the Constitutional Court 17.098/2003, 19.492/2011 and 19.682/2012).

As the further development of the law has shown, this distinction cannot be maintained without unduly discriminating against same-sex couples with regard to their sexual orientation. Same-sex couples must therefore also be able to become parents – by way of adoption or permitted forms of artificial reproduction (cf. Selected Judgements of the Constitutional Court 19.942/2014).

Accordingly, due to the developments presented above (cf. items III.4.2. and III.4.3.), applicable law seems to provide for the equal treatment of opposite-sex and same-sex couples for the most part. The institutions of marriage and registered partnership seem to be similar to each other as far as the provisions governing them are concerned, and spouses or registered partners are treated more or less equally also in the relevant legal fields (cf. *Leb, Ehe, Verlöbnis und eingetragene Partnerschaft* [Marriage, engagement and registered partnership], in: *Deixler-Hübner* [ed.], *Handbuch Familienrecht* [Handbook of family law], 2015, 39 [63 ff.]; *Deixler-Hübner, Scheidung, Ehe und Lebensgemeinschaft*<sup>12</sup> [Divorce, marriage and cohabiting relationships], 2016, 4).

Against this background, the Constitutional Court, for the time being, is acting on the presumption that legislators have separated marriage and registered partnership, but in essence provide for equal rules, with the consequence that it can be seen in a wide range of relationship arrangements that something comparable but unequal in terms of legal

relations and legal consequences is covered by different institutions: against the background of the legal and social discrimination of persons with same-sex sexual orientation until the recent past, maintaining different legal institutions in connection with different terms for relationships that are basically equal in their nature and their meaning for individuals seems to have what is primarily a discriminating effect, which is the very effect that Art. 7 (1) of the Federal Constitutional Law prohibits as its most significant content. The different legal institutions and the different terms seem to be intended to make it clear to the public and to any person that the personal relationship between two persons of the same sex which is embodied in a registered partnership is something different – according to earlier understanding something 'of less value' – than marriage between two persons of different sex, although the intentions of both relationships are based on the same values.

Even if absolutely the same legal provisions applied to both legal institutions as regards their requirements and legal consequences, maintaining different terms seems to state that persons with same-sex sexual orientation are definitely not equal to persons with heterosexual orientation from the viewpoint of the principle of equality. At first glance, this seems to be revealed by the fact that due to the different terms used to designate a person's civil status ('married' versus 'partnered'), persons in a same-sex partnership have to disclose their sexual orientation even in situations in which it is not and must not be of any significance and, especially against the historical background of this issue, are at risk of being discriminated against."

5. The federal government has not submitted a statement. 5

6. The complainants in the case that triggered the judicial review proceedings, as the parties involved, have submitted a statement in which they share the concerns of the Constitutional Court. 6

## II. The law

1. An excerpt from the General Civil Code, Collection of Laws 946/1811 as amended by Federal Law Gazette I 87/2015, reads as follows (the phrase under review applies as amended by the Collection of Laws 946/1811): 7

"Part one.  
About the law of persons.  
[...]  
Chapter two.  
About marriage law.  
Concept of marriage,

Section 44. Family relationships are founded by marriage contract. In a marriage contract two individuals of different sex lawfully declare their intent to live in an inseparable companionship, to beget children, to bring them up and to provide support to each other.

[...]

#### Personal legal effects of marriage

Section 89. The personal rights and obligations of spouses in relation to each other are equal, unless this chapter provides otherwise.

Section 90. (1) Spouses shall mutually commit themselves to an all-encompassing marital community, in particular they shall cohabit, be faithful and interact with one another with fairness and support one another.

(2) A spouse has to contribute to the other's earnings to the extent this can be expected from the spouse, is customary according to the spouses' living conditions and has not been agreed otherwise.

(3) Each spouse is obliged to assist the other in exercising custody of the spouse's children in a reasonable manner. To the extent required by the circumstances, each spouse represents the other in the custody affairs of daily life.

Section 91. (1) The spouses shall organize their marital community by consensus, in particular the housekeeping, the earning of a living, the provision of support, and custody, in mutual respect for one another and the welfare of the children and with the aim of achieving an equal balance of their respective contributions.

(2) A spouse may depart from the principle of consensus unless there is a major concern of the other spouse or the children or even if such a concern exists, if the personal reasons of the one spouse, in particular a spouse's wish to take up work, are deemed to be overriding. In these cases the spouses must try to reach consensus regarding the re-organization of the marital community."

2. An excerpt from the Federal Act on Registered Partnership, Federal Law Gazette I 135/2009 as amended by Federal Law Gazette I 25/2015, reads as follows: 8

#### "Article 1

##### General provisions

##### Scope of application

Section 1. This Federal Act regulates the entering into, the effects, and the dissolution of a registered partnership between same-sex couples (in the following 'registered partnership').

##### Nature of a registered partnership

Section 2. A registered partnership can be entered into only by two persons of the same sex (registered partners). By doing so, they unite to form a permanent partnership involving mutual rights and obligations.

[...]

#### Article 2

##### Entering into a registered partnership

[...]

##### Obstacles to entering into a registered partnership

Section 5. (1) A registered partnership must not be entered into  
1. by persons of different sex;

[...]

Article 3  
Effects of a registered partnership

[...]

"Rights and duties

Section 8. (1) Unless otherwise provided for in this Federal Act, the personal rights and duties of registered partners in relation to one another shall be equal.

(2) Registered partners shall mutually commit themselves to an all-encompassing partnership and to a relationship that is based on trust, in particular they shall cohabit, interact with one another with fairness and support one another.

(3) Registered partners shall organize their partnership by consensus in mutual respect for one another, with the aim of achieving an equal balance of their respective contributions. A registered partner may depart from the principle of consensus unless there is a major concern of the other partner, or even if such a concern exists, if the personal reasons of the one partner are deemed to be overriding.

[...]

Section 5  
Nullity of the registered partnership

Section 19. (1) A registered partnership shall be null and void only in the cases specified in the following paragraphs. [...]

(2) A registered partnership shall be null and void if

1.-2. [...]

3. at the time a registered partnership was entered into, a registered partner was validly married with a third person or was living in a valid registered partnership with a third person; [...]"

### III. Considerations

#### As to the admissibility

1. In the proceedings, nothing emerged that would have cast doubt on the fact that the provisions under review serve as a precedent and are inseparably connected. As no circumstances precluding proceedings emerged either, the judicial review proceedings have proved to be admissible in general. <sup>9</sup>

#### On the merits

2.1. Pursuant to section 44 of the General Civil Code, marriage can be entered into only by two persons of different sex; same-sex couples can enter into a registered partnership pursuant to the Registered Partnership Act. Both marriage and registered partnership have been devised as an all- <sup>10</sup>

encompassing, permanent partnership of two humans with equal rights, according to the partnership principle, based on mutual support and consideration (cf. sections 44 and 89 ff. of the General Civil Code and sections 2 and 8 ff. of the Registered Partnership Act). This means that marriage and registered partnership have in common that they create a legal framework for couples to live together with equal rights by institutionalizing a permanent, stable relationship (cf. Selected Judgements of the Constitutional Court 19.942/2014).

As is revealed by the legislative materials (explanations regarding the government bill, annex 485 of the National Council, 24<sup>th</sup> legislative period, p. 3) and by the genesis of the Registered Partnership Act (see *Benke, Zum Bundesgesetz über die eingetragene Partnerschaft 2009: Weder Ehe noch Familie* [On the Federal Act on Registered Partnership 2009: neither marriage nor family], EF-Z [Journal for Family and Inheritance Law] 2010, 19 [19 ff.]; *Gröger, Das Eingetragene Partnerschaft-Gesetz (EPG)* [The Registered Partnership Act], ÖJZ [Austrian Journal for Lawyers] 2010, 197 [197 f.]), legislators decided, when creating a legal framework for same-sex couples to live together, on a model which was different from marriage to give these couples an adequate legal position. In its effects, registered partnership was not supposed to represent "a 'light' version of marriage" or a "second-string marriage", so the literal wording of the legislative materials (explanations regarding the government bill, annex 485 of the National Council, 24<sup>th</sup> legislative period, p. 3). Meanwhile, marriage and registered partnership have come to resemble each other for the most part as far as the legal provisions governing them and the legal consequences are concerned, although there are still some slight differences between the two legal institutions (e.g. the different minimum age for entering into marriage and entering into a registered partnership pursuant to section 1 (2) of the Marriage Act and § 4 (1) of the Registered Partnership Act). 11

Recent developments in law allowed, in particular, joint parenthood also of same-sex couples: same-sex couples are allowed to (jointly) adopt children (cf. in particular sections 191 and 197 of the General Civil Code) and use permitted forms of medically assisted procreation on an equal footing (cf. section 2 (1) in connection with (2) item 3 of the Reproductive Medicine Act, Federal Law Gazette 275/1992 as amended by Federal Law Gazette I 35/2015). In accordance with the possibility of joint parenthood, the provisions of the law on marriage and children regarding joint children, which regulate arrangements in a marital community and the requirements and consequences of the dissolution of a marriage or divorce, are now also applicable to registered partners and their children pursuant to section 43 12

(1) item 27 of the Registered Partnership Act (explanations regarding the government bill, annex 2403 of the National Council, 24<sup>th</sup> legislative period, p. 6).

2.2. The principle of equality is also binding on legislators (see e.g. Selected Judgements of the Constitutional Court 13.327/1993, 16.407/2001). This principle imposes limits on legislators insofar as it prohibits them from providing for unequal treatment for which there are no objective reasons (cf. e.g. Selected Judgements of the Constitutional Court 14.039/1995, 16.407/2001). Only particularly serious reasons may justify unequal treatment in the law which is connected to potentially discriminating characteristics, such as those mentioned in Art. 7 (1) sentence 2 of the Federal Constitutional Law (cf. Selected Judgements of the Constitutional Court 19.942/2014, with further references to decisions of the Constitutional Court regarding statutory distinctions based on sex or sexual orientation). 13

2.3. When creating the Registered Partnership Act, legislators had the aim of enabling same-sex couples to have their relationship legally recognized and in this way to counteract discrimination against same-sex couples. The fact that different legal institutions were created for opposite-sex and same-sex couples must be seen against the background that marriage, following a certain traditional understanding (and because this concept has 'deep-rooted social and cultural connotations', cf. ECtHR, June 24, 2010, case *Schalk und Kopf*, appl. 30.141/04, no [62]; Selected Judgements of the Constitutional Court 19.492/2011) was aimed at parenthood (at least the possibility of it) and, for a long time, joint parenthood was not possible for same-sex couples (cf. Selected Judgements of the Constitutional Court 17.098/2003, 19.492/2011 and 19.682/2012). 14

2.4. This distinction between two legal institutions can no longer be upheld today without discriminating against same-sex couples with regard to their sexual orientation. Due to the fact that, according to applicable law, legislators have separated marriage and registered partnership – and, as a consequence, opposite-sex and same-sex couples by providing for different institutions for their relationships to be recognized by the state, even if the provisions governing those institutions have essentially the same legal consequences – it can be seen in a wide range of relationship arrangements that although registered partnership and marriage are comparable in terms of legal relations and legal consequences, those institutions still cover relationships that are basically unequal. 15

2.5. Against the background of the legal and social discrimination of persons with same-sex sexual orientation until the recent past (cf. Selected Judgements of the Constitutional Court 19.492/2011), this separation of relationships that are basically equal in their nature and their meaning for individuals into two different legal institutions has a discriminating effect, which is the very effect that Art. 7 (1) sentence 2 of the Federal Constitutional Law prohibits as the most significant content of the principle of equality. From the perspective of same-sex couples, this separation into different legal institutions makes it clear to the public and to any person that the relationship between two persons of the same sex embodied in a registered partnership is something different than marriage between two persons of different sex, although the intentions of both relationships are based on the same values. Thus, separation into two legal institutions, even if the legal provisions governing them are the same, expresses that persons with same-sex sexual orientation are not equal to persons with heterosexual orientation. The resulting discriminating effect is reflected in the fact that on account of the different terms used to designate a person's civil status ("married" vs. "living in a registered partnership"), persons living in a same-sex partnership have to disclose their sexual orientation even in situations in which it is not and must not be of any significance and, especially against the historical background of this issue, they are at risk of being discriminated against. Art. 7 (1) sentence 2 of the Federal Constitutional Law is intended to provide protection against such effects. 16

2.6. The distinction in the law between opposite-sex and same-sex relationships as two different legal institutions thus violates the principle of equality, which forbids any discrimination of individuals on grounds of personal characteristics, such as their sexual orientation. 17

3.1. The Constitutional Court must define the scope of the provisions to be reviewed and, if need be, repealed, in such manner that nothing more than what formed the basis for the case that triggered the judicial review proceedings is eliminated from existing legislation, and that the meaning of the remaining legal provisions is not changed. As both aims can never be fully reached at the same time, it must be considered in each individual case whether and to what extent certain aims take prevalence over others (Selected Judgements of the Constitutional Court 7376/1974, 16.929/2003, 16.989/2003, 17.057/2003, 18.227/2007, 19.166/2010, 19.698/2012). 18

3.2. To create a legal situation that eliminates the unconstitutionality which has been identified, it is necessary and sufficient to repeal as unconstitutional the phrase "of different sex" in section 44 of the General 19

Civil Code and the phrases "of same-sex couples" in section 1 of the Registered Partnership Act, "of the same sex" in section 2 of the Registered Partnership Act, and section 5 (1) item 1 of the Registered Partnership Act. These reciprocal restrictions on access are part of a system in partnership law that spans laws and legal institutions and reserves marriage for opposite-sex couples and registered partnership for same-sex couples. If only one restriction on access was eliminated, that restriction would still result from the other restriction (cf. Selected Judgements of the Constitutional Court 19.942/2014). The fact that after the repeal opposite-sex couples and same-sex couples can choose to enter into marriage or into a registered partnership does not represent a completely changed content of the law in accordance with previous decisions by the Constitutional Court, given that the Registered Partnership Act will continue to be in force as a legal framework, also for existing registered partnerships.

#### IV. Result

1. The phrase "of different sex" in section 44 of the General Civil Code, Collection of Laws 946/1811, and the phrases "of same-sex couples" in section 1 and "of the same sex" in section 2, as well as section 5 (1) item 1 of the Registered Partnership Act, Federal Law Gazette I 135/2009 as amended by Federal Law Gazette I 25/2015, are therefore to be repealed as unconstitutional for violating the principle of equality. 20
2. In all other respects, i.e. in respect of the parts of the Registered Partnership Act that have not been reviewed, it had to be found that these should not to be repealed as unconstitutional. 21
3. Setting a deadline for the repealed statutory provisions to become ineffective is based on Art. 140 (5) sentences 3 and 4 of the Federal Constitutional Law. 22
4. The finding that earlier legal provisions shall not re-enter into force is based on Art. 140 (6) sentence 1 of the Federal Constitutional Law. 23
5. The Federal Chancellor's obligation to immediately promulgate the repeal and the related other findings results from Art. 140 (5) sentence 1 of the Federal Constitutional Law and section 64 (2) of the Constitutional Court Act (*VfGG, Verfassungsgerichtshofgesetz*) in connection with section 3 item 3 of the Federal Law Gazette Act (*BGBIG, Bundesgesetzblattgesetz*). 24

6. Pursuant to section 19 (4) of the Constitutional Court Act, this <sup>25</sup>  
decision could be taken without an oral hearing after private deliberations.

Vienna, December 4, 2017  
The President:  
Dr. HOLZINGER

Recording clerk:  
REITHMAYER-EBNER

*Unofficial translation by Mag. Bettina Rittsteuer ([www.rechtsuebersezung.at](http://www.rechtsuebersezung.at)) mandated by  
Dr. Helmut Graupner ([www.graupner.at](http://www.graupner.at)), complainants' counsel in the case.*